SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 459

THOMAS CLYDE HELTON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

I.

Opinion of the Court Below.

The opinion in this case of the Circuit Court of Appeals (R. 70-74), filed in said court on July 17, 1944, so far as petitioner and his counsel are advised, has not as yet been officially reported.

II.

Jurisdiction.

A concise statement of the grounds on which the jurisdiction of this Court is invoked is made in the accompanying

petition for writ of certiorari under the corresponding heading therein "Jurisdiction," and is hereby adopted and made a part hereof.

It may be added that the following cases, in which convictions under other clauses of Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. A., Appendix, Section 311) were reviewed, sustain said jurisdiction:

Bartchy v. *United States*, 319 U. S. 484, 87 L. ed. 1534, 63 S. Ct. 1206;

Hartzel v. *United States*, decided June 12, 1944, — U. S. —, 88 L. ed. 1163 (Advance Opinions).

III.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for writ of certiorari under the corresponding heading therein "Summary Statement of the Matter Involved," and in the interest of brevity said statement in said petition is not here repeated but by reference is hereby adopted and made a part hereof. Any necessary elaboration of the evidence on the points or questions herein involved will be made in the course of the argument herein.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in finding and holding (R. 73) that there was substantial evidence from which the jury could find that the assault by petitioner upon Dr. Andrew J. Jamison was caused by Dr. Jamison's exercise of duties as a Selective Service examining physician.

2. The Circuit Court of Appeals erred in finding and holding (R. 74) that an assault upon an examining physi-

cian, or a member of a local Selective Service Board, growing out of his exercise of duty, is an interference by force and violence with the administration of the Selective Training and Service Act of 1940 or rules or regulations thereunder, within the meaning and purview of that portion of Section 11 of said Act (50 U. S. C. A., Appendix, Section 311) for the violation of which petitioner was indicted and convicted in this case.

3. The Circuit Court of Appeals erred in not finding and holding that it was necessary and essential, to warrant or sustain petitioner's conviction for the offense defined in said portion of said Act and charged in the indictment, that the assault upon said Dr. Jamison be proved, by substantial evidence, to have been committed by petitioner "knowingly," as provided in said portion of said Act, that is, with the deliberate purpose or the specific or actual intent to hinder or interfere with the administration of said Act or the rules or regulations thereunder, and in not finding and holding that there was no, or not sufficient, substantial evidence proving that said assault was made "knowingly," that is, with such intent.

4. The Circuit Court of Appeals erred in not finding and holding that, to warrant or sustain petitioner's conviction of said offense, it was necessary and essential that said assault be proved, by substantial evidence, to have caused some actual hindrance or interference with the administration of said Act or rules or regulations, either by incapacitating Dr. Jamison from exercising or performing his duties as such examining physician, or by restraining him or some member of his Selective Service Board or other official or employee, charged with such administration, by fear, from exercising his or their free judgment in the discharge and performance of his or their duties under said Act or rules or regulations, or by otherwise preventing him or them from

performing such duties, and in not finding and holding tha such actual hindrance or interference was not so proved.

5. The Circuit Court of Appeals erred in finding an holding, in effect, that sufficient substantial evidence wa adduced on the trial to warrant and to sustain petitioner' conviction of said offense.

V.

Summary of the Argument.

Point A. To warrant or sustain the conviction of the peti tioner, there must be substantial evidence to prove the fol lowing facts, all of which are essential elements or ingredi ents of the offense charged, to-wit:

1. That the assault by petitioner upon Dr. Jamison wa caused by or grew out of Dr. Jamison's exercise or perform ance of his duties as examining physician.

2. That said assault was committed "knowingly," tha is, with the deliberate purpose or specific or actual intent t hinder or interfere with the administration of the Selectiv Training and Service Act of 1940 or the rules or regulation thereunder.

3. That said assault caused an actual hindrance or inter ference with the administration of said Act or rules or regu lations, either by incapacitating Dr. Jamison from exer cising or performing his duties as examining physicia or by restraining him or some member of his Selectiv Service Board or other official or employee, charged wit such administration, by fear, from exercising his or thei free judgment in the discharge and performance of his o their duties under said Act or rules or regulations, or b otherwise preventing him or them from performing suc duties.

Point B. There is no, or insufficient, substantial evidence to prove the propositions of fact, the essential elements or ingredients of the offense charged, stated in Point A, supra, or otherwise to prove petitioner's guilt.

VI.

Argument.

Point A.

Section 11 of the Selective Training and Service Act of 1940 (50 USCA, Appendix, Section 311), under which petitioner was indicted and convicted, in so far as applicable, reads:

> "Any person * * * who shall knowingly hinder or interfere in any way by force and violence with the administration of this Act or the rules or regulations made pursuant thereto, * * * shall, upon conviction * * * be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * * ".

It seems clear from the mere reading of said clause of said Section 11, and it is submitted, that the offense defined and created thereby involves the following necessary elements or ingredients, to-wit:

First. The commission of some act or acts by force and violence, cause by or growing out of the administration of said Act or the rules or regulations thereunder; that is, said act or acts must be in some way connected with, relate to, or grow out of the exercise and performance of some duty required in, such administration.

The Circuit Court of Appeals, in finding (R. 73) that petitioner's assault was caused by Dr. Jamison's exercise of his duties as examining physician and in holding (R. 74)

that such assault, so caused, was an interference by force and violence with such administration, also by necessary implication held that it is a necessary element or ingredient of said offense that said act or acts of violence be caused by, relate to, or grow out of such administration. In the cases of *Moore* v. *United States*, 128 F. (2d) 974 (C. C. A. 5) and *Burwell* v. *United States*, 137 F. (2d) 155 (C. C. A. 4), involving prosecutions for violations of the same clause, as here, of Section 11 of said Act, the assaults clearly related to or grew out of such administration, and said cases are relied upon as supporting the insistence here made.

Second. That said act or acts be committed "knowingly", that is, with the deliberate purpose, or specific or actual intent, to hinder or interfere with the administration of said Act or the rules or regulations thereunder.

Congress must have intended that the word "knowingly" in the clause of Section 11 of said Act, quoted supra, have some significance, other than the ordinary criminal intent or scienter, that is, in the sense that a person must intend the consequences of his acts, because such ordinary criminal intent and scienter would be an element of the offense, without the inclusion of the word "knowingly" in said clause. Thus, unless it is given some significance other than such ordinary criminal intent or scienter, said word is in effect read out of the statute, and is mere surplusage.

It is submitted, despite the reliance on the first of them by the Circuit Court of Appeals, in its Opinion (R. 74), that the insistence that a deliberate purpose or specific or actual intent to hinder or interfere with such administration is supported and sustained by the following reported cases: *Moore* v. *United States*, supra; *United States* v. *Trypuc*, 136 F (2d) 900 (C. C. A. 2); *United States* v. *Hoffman*, 137 F. (2d) 416.

In *Moore* v. *United States*, supra, the Court in part said:

> "* * * *The jury also was justified in concluding from the evidence that Moore committed the assault well knowing that his acts would so hinder and interfere with the board's performance of its duties.* The day before the assault was committed, Moore had announced that he would prevent a member of the board from putting him in the Army, and that he would straighten out the board with regard to his classification. *His later acts made clear that it was his intention to produce this result by the illegal method of force and violence rather than the legal procedure of producing additional evidence.*" (Italics added.)

In *United States* v. *Trypuc*, supra, involving a conviction of a registrant under another clause of Section 11 of said Act, for "knowingly" failing to keep his draft board advised of an address where mail would reach him, the court in part said at 136 F. (2d) 901:

> "We cannot accept the contention that the evidence was insufficient to support the verdict. But an examination of the charge convinces us that the issue whether the appellant 'knowingly' failed to keep the board advised of an address where mail would reach him was not properly submitted to the jury. The judge charged that whether the address given in the questionnaire was correct is unimportant 'because I will narrow it down to the charge that he failed to keep the Draft Board notified as to his change of address, which he admittedly made and which he did not inform the Draft Board of.' The judge went on to say that every person must be deemed to have notice of the requirements of the Act. 'You can't say "I did not know of it" because you are deemed to know of it.' Doubtless the judge had in mind Articles 641.1 and 641.2 of the Regulations. *But we do not think the Regulations can be interpreted so broadly as to read 'knowingly' out of the statute.* Not every failure to perform a duty im-

> posed by the statute is made criminal; only a person 'who shall knowingly fail or neglect' his duty is to be punished. * * *'' (Italics added).

In *United States* v. *Hoffman*, supra, involving the conviction of a registrant under said Section 11, the court in part said at 137 F (2d) 419:

> "Since it was conceded that defendant's delay in arrival would not alone have been regarded as harmful—and this accords with the regulations, 32 C. F. R., 1941 Supp. 633.12 (b)—*the real question is as to his intent when he arrived;* and this is the issue which the Court submitted to the jury. *This seems proper, the statute requires something more than mere failure, for the accused must 'knowingly fail or neglect to perform' a statutory duty.* 50 U. S. C. A. Appendix, Sec. 311; United States v. Trypuc, 2 Cir., June 11, 1943, 136 F. (2d) 900. * * *'' (Italics added).

Third. That said act or acts cause or result, as a matter of fact, in some actual hindrance or interference with the administration of said Act or the rules or regulations thereunder.

The clause of said Section 11 of said Act, quoted supra, does not by its terms, make it an offense to attempt by force and violence to hinder or interfere with the administration of said Act or the rules or regulations thereunder, as for example by an assault with such intent; and, since the Act does not in terms make such attempts an offense, it is submitted that Congress intended to make unlawful, and to punish, only acts of force and violence that cause, or result in, some hindrance or interference with such administration as a matter of fact. Congress could well have intended, as it is insisted was done, only to prohibit and punish acts of force and violence that, as a matter of fact, cause or result in an actual hindrance or interference with such administration, and to leave to the police and criminal

courts of the states the prosecution and punishment of other such acts not causing or resulting in such hindrance or interference.

Despite the Circuit Court of Appeals reliance thereon in its opinion (R. 74), it is submitted that neither the case of *Burwell* v. *United States*, supra, nor *Moore* v. *United States*, supra, hold contrary to this contention. In *Burwell* v. *United States*, supra, the examining physician assaulted in that case in effect testified that said assault caused him to feel that it was unsafe for him to continue as examiner for his draft board and thus actual hindrance or interference was shown by evidence in the case to have been caused by said assault. In *Moore* v. *United States*, supra, particularly in view of the fact that the draft board had just the day before rejected the defendant's claim of deferment on account of dependency of his parents and classified him 1-A, the fact that by statements and threats he evinced a determination to influence the action of his draft board, and the fact that at the time of the assault he was discussing said board's action with its chairman and complaining thereof, it is submitted that all the court held, on the facts of that case, was that the evidence warranted the jury in finding such actual hindrance or interference. Further, it does not appear from the reported opinion in either of said cases that the question, whether an actual hindrance or interference resulted from the assault, was made or relied on.

It appears from the indictment (R. 2), and from the undisputed evidence in the case (R. 24-26, 30-32, 35, 37-38, 45-48, 52-53) that the only act of force and violence on the part of petitioner, charged and proven as the basis for petitioner's conviction, was petitioner's assault upon Dr. Jamison on June 10, 1943. It also appears from such evidence (R. 20-21, 22, 24, 27-28, 42, 43-44) that the only exercise of duty by Dr. Jamison as examining physician,

with respect to petitioner, was his physical examination or partial examination of petitioner on December 23, 1940. Therefore, it is submitted that it is necessary and essential, in order to have warranted and to sustain petitioner's conviction in this case, that there be substantial evidence in the record to prove that said assault was caused by or grew out of Dr. Jamison's said examination or partial examination of petitioner; that petitioner committed said assault "knowingly", that is, with the deliberate purpose or the specific or actual intent to hinder and interfere with the administration of the Selective Training and Service Act of 1940 or the rules or regulations thereunder; and that said assault caused or resulted, as a matter of fact, in an actual hindrance or interference with such administration.

POINT B.

The evidence in the case has been extensively reviewed in the accompanying petition for writ of certiorari under the heading therein "Summary Statement of the Matter Involved", and in the interest of brevity it is not proposed again to summarize all the evidence in detail, but said review is hereby adopted and referred to. However, in order to determine whether or not there is sufficient substantial evidence in the record to prove the aforesaid essential propositions of fact, the essential elements or ingredients of the offense charged, it is deemed necessary to review and discuss in more or less detail the material evidence in the case relating thereto.

There is no dispute whatsoever in the evidence or on the record herein as to the following facts or matters:

1. As shown under Point A, supra, the only act of force and violence on the part of petitioner, charged and proven as the basis for petitioner's conviction, was petitioner's assault on Dr. Jamison on June 10, 1943, and the only ex-

ercise of duty by Dr. Jamison as examining physician, which could have caused, out of which said assault could have grown, or to which it could be claimed that said assault related, was Dr. Jamison's examination or partial examination of petitioner on December 23, 1940.

Dr. Jamison did not complete said examination nor sign a report of said examination, and Dr. Murfree continued and completed said examination, according to Dr. Jamison's testimony (R. 27), the testimony (R. 21, 22) of the clerk of his local Board, and petitioner (R. 42-43) which is all the evidence in the record on the subject.

After said examination or partial examination, Dr. Jamison did not, and there is no evidence that he was again at any time called upon to, examine petitioner; he never signed nor made any report of any physical examination of petitioner; and thereafter had no further connections or contacts whatsoever at any time with petitioner in his capacity as examining physician. Dr. Jamison (R. 27), the clerk of the local Board in effect (R. 20-23), and petitioner (R. 43-44), the only witnesses on the subject, all testified that Dr. Jamison examined petitioner only once, on December 23, 1940. Both Dr. Jamison (R. 27) and said clerk (R. 21), the only witnesses on the subject, testified that Dr. Jamison signed none of the reports of physical examinations of petitioner. Both Dr. Jamison (R. 27-28) and petitioner (R. 43-44), the only witnesses on the subject, testified that, after said examination, or partial examination, Dr. Jamison had no further connection whatsoever at any time with petitioner as examining physician, and petitioner had no further contacts whatsoever with Dr. Jamison relating to his draft status.

Thus, it is uncontradicted that the only exercise of duty or connection whatsoever that Dr. Jamison in his capacity as examining physician at any time performed or had in relation to petitioner was his said examination or partial

examination, and the conclusion is inescapable that, if Dr. Jamison was trying to put or "railroad" petitioner into the Army (as to which reference is here made to the discussion, infra, of the evidence to that effect), or if he was doing or saying anything to cause petitioner to be inducted into the armed services, whatever he was saying or doing, if anything, must have been said or done in his *private* or *unofficial* capacity as distinguished from his official capacity as examining physician.

2. Petitioner was classified and placed in Class IV-F by his local Board on January 31, 1941, upon the basis of Dr. Walton's report of January 29, 1941, that he had or was suffering from psychoneurosis hysteria, and of Dr. Murfree's report of January 28, 1941, that he had or was suffering from psychoneurosis (R. 21, 23, 43). Petitioner remained in Class IV-F from January 31, 1941, to June 12, 1942, when he was classified I-A, was called for induction and sent to the induction center at Fort Oglethorpe, Georgia, where he was examined and rejected on July 21, 1942, on account of psychoneurosis, and thereupon, on July 27, 1942, on the basis of the Army examining officer's rejection of him on account of psychoneurosis, he was reclassified and returned to Class IV-F, where he has at all times since remained. Petitioner had not, down to the time of the trial in this case, thereafter been called for further physical examination, nor had any further change been made in his classification or draft status (R. 21, 23, 44).

Thus, the conclusion is compelled that petitioner, certainly for nearly a year prior to his difficulty or encounter with Dr. Jamison on June 10, 1943, had every reason to believe that he was unfit for military service and would permanently remain in Class IV-F, and consequently he had no reason or motive to seek or in any way to bring about any change in his classification or draft status.

3. Petitioner did not at any time seek deferment or exemption from military service; he did not appeal from nor seek any review of any physical examination given him or any classification in which he was at any time placed by his Local Board (R. 21-22, 44); there is no evidence whatsoever that petitioner appealed to the Medical Advisory Board of said Local Board, nor that he was in any way dissatisfied with the result of his examination by Dr. Jamison on December 23, 1940, by Dr. Murfree in January, 1941, and in June, 1942, but it affirmatively appears (R. 21, 43) that petitioner was referred to Dr. Walton, a member of said Medical Advisory Board, on recommendation of Dr. Murfree; there is no evidence that petitioner at any time asked or requested to be examined by any doctor or examining physician or that he at any time made any complaint or expressed or manifested any dissatisfaction as to the physical examination given him by either Dr. Jamison, Dr. Murfree or Dr. Walton, in regard to any classification in which he was at any time placed; and it affirmatively appears (R. 22-23) that he responded to every notice to appear for physical examination, his notice of induction and all other notices from his Local Board calling for a response from him (R. 22-23, 42, 44); and petitioner volunteered for service in June, 1942, but was rejected on his physical examination (R. 45).

No evidence was adduced, and there is no evidence in the record, showing or tending to show that petitioner at any time or place or to any person whatsoever made any reference whatsoever to his examination or partial examination by Dr. Jamison on December 23, 1940, or to any of his other physical examinations, or with reference to any of his classifications or any other action taken by his Local Board with reference to his draft status.

Thus, there was nothing that occurred in connection with petitioner's physical examinations, classifications or any

other action taken with reference to his draft status or case to justify the inference or conclusion that he was disgruntled, angered or dissatisfied therewith, or that petitioner desired or at any time did anything whatsoever to avoid military service.

It is therefore submitted that the matters stated, in 1, 2 and 3 immediately above, are wholly inconsistent with the conclusions of the Circuit Court of Appeals (R. 73) to the effect that the jury was justified in finding that petitioner at the time of his assault upon Dr. Jamison nursed a grudge against him on account of what Dr. Jamison had said to him, at the time of his examination of petitioner on December 23, 1940, to the effect that he found him physically fit for military service and that the Army might do his nerves good (R. 24, 42), and to the effect that there was substantial evidence from which the jury could find that said assault was caused by Dr. Jamison's exercise of his duties as a Selective Service physician, and wholly inconsistent with any other theory that said assault was caused by, grew out of, or had any connection whatsoever with said physical examination.

The testimony of Dr. Jamison, and the statements attributed to petitioner, hereinafter discussed in detail, it is earnestly submitted, do not supply the necessary and requisite, substantial evidence to connect said assault with said examination, or to prove that said assault was caused by or grew out of said examination, and to prove that said assault was made "knowingly", that is, with the deliberate purpose or specific or actual intent to hinder or interfere with the administration of the Selective Training and Service Act of 1940 or the rules or regulations thereunder. An examination and discussion of said testimony and statements follow:

1. Dr. Jamison testified on direct examination (R. 24) that, after his examination of petitioner on December 23,

1940, petitioner "seemed to be cold or less friendly or cordial toward me", and on cross-examination (R. 28) that he "thought" petitioner "seemed" cooler.

In connection with this testimony, it is pointed out that Dr. Jamison gave no basis for his conclusions; that evidently Dr. Jamison himself was not impressed with any change in petitioner's attitude (R. 24); that Dr. Jamison admitted (R. 28) that they had never been friendly, had had but one conversation prior to said examination, and just knew who petitioner was and spoke to him in passing; that Dr. Jamison admitted (R. 28) that he saw and passed petitioner numerous times between said examination and the difficulty between them on June 10, 1943, and petitioner never threatened, hit, nor said anything that showed he was mad or disgruntled; and that Dr. Jamison did not testify nor is there any evidence, that petitioner during said examination manifested any displeasure, dissatisfaction or anger, and that there is no evidence that petitioner at any time or place or to any person ever made any reference to said examination or to anything that Dr. Jamison said or did at the time.

In view of the matters just stated, and since said testimony is the opinion or conclusion of the witness unsupported by the recital of any fact or facts upon which it is based and is in fact incompetent and entitled to no weight as evidence, and since said testimony is inherently weak and, even if conceded to be some evidence that petitioner was less friendly towards Dr. Jamison, there is nothing therein to show that petitioner was less friendly on account of anything that was said or done during said examination, it is submitted that said testimony does not constitute substantial evidence either that said assault was caused by, grew out of, or had any connection with, said examination, or that petitioner assaulted Dr. Jamison "knowingly", that is, with the deliberate purpose or specific

or actual intent to hinder or interfere with the administration of the Selective Training and Service Act or the rules or regulations thereunder.

2. The witness, Maudie Pitts, testified (R. 35) that, "one time" before the encounter between Dr. Jamison and petitioner, petitioner said to her, "I am going to get Dr. Jamison." Just when and where said statement was made, assuming it was made, does not appear except that it was made at some indefinite time prior to said encounter. The witness does not disclose what was being discussed, if anything, between her and petitioner at the time, nor in what connection said statement was made. There is nothing in the statement to show that it had any connection with Dr. Jamison's examination of petitioner back in December, 1940, or with anything that occurred during said examination. Since the statement could have been made almost two and one-half years after said examination and still have been made prior to said encounter, during which time Dr. Jamison as examining physician had no further connection whatsoever with petitioner, said statement, even if conceded to be evidence that petitioner was threatening or expressing animosity towards Dr. Jamison, could just as readily have referred, and more probably did refer, to something said or done by Dr. Jamison in his *private* or *unofficial* capacity, as to anything that was said or that occurred during said examination. Therefore, it is submitted that this statement attributed to petitioner is not substantial evidence either that said assault was caused by, grew out of or had any connection whatsoever with said examination, or that said assault was made knowingly", that is, with the deliberate purpose or specific or actual intent to hinder or interfere with said Act or the rules or regulations thereunder.

3. Dr. Rawlins testified (R. 38) that he heard petitioner say, during a discussion of various phases of the draft, that he was willing to go to the Army, did not feel he was any better than anybody else, and if they wanted him he would go, but that he did not feel that he should be "railroaded" into the Army as Dr. Jamison was "railroading him." Dr. Rawlins (R. 38) does not fix the time this statement was made, other than to say it might have been anywhere from three weeks to six months before the assault upon Dr. Jamison, but petitioner (R. 48) fixed the time as back in the winter of 1943, or approximately six months before said assault. The statement attributed to petitioner does not refer to Dr. Jamison's physical examination of him two years before, in December, 1940. The words "was railroading" indicate that the statement, if conceded to have been made, had reference to something Dr. Jamison was currently doing or saying or that petitioner thought he was currently saying or doing, to cause petitioner's induction into the armed services, and yet it is undisputed that the only official act or exercise of duty by Dr. Jamison as examining physician with reference to petitioner was his examination of him two years before. Said statement, therefore, in all probability and almost certainly referred to something subsequently said or done by Dr. Jamison in his *private* and *unofficial* capacity and not to said examination. Petitioner (R. 48) related the whole conversation with Dr. Rawlins on said occasion and, since Dr. Rawlins was not recalled and no effort was made to contradict his account of said conversation, it is to be presumed that, had Dr. Rawlins been recalled, he would not have contradicted petitioner, and therefore it is submitted that petitioner's reasonable and satisfactory explanation of said conversation must be considered in determining the probative value of the aforesaid statement attributed to him by Dr. Rawlins.

In view of these considerations, it is insisted that this statement attributed to petitioner is not substantial evidence to prove either that said assault was caused by, grew out of, or had any connection with said physical examination of petitioner by Dr. Jamison, or that said assault was committed "knowingly", that is, with the deliberate purpose or specific or actual intent to hinder or interfere with the administration of said Act or the rules or regulations thereunder.

4. Dr. Jamison testified (R. 25) that, in the drug store just before the difficulty, petitioner said to him, "I've got it in for you." There is nothing in this statement to connect it with said physical examination, made approximately two and one-half years before, nor was anything said at the time in connection with said statement to show that petitioner had it in for Dr. Jamison about anything that was said or that occurred during said examination or to indicate why petitioner was mad at Dr. Jamison, assuming that he was; and, considering the great lapse of time since said examination and the fact that it is undisputed that said examination was the only *official* act or exercise of duty by Dr. Jamison as examining physician ever performed by him in relation to petitioner, it is more reasonable and probable, especially since it affirmatively appears (R. 28) that he and Dr. Jamison met and passed numerous times in the interval between said examination and their encounter and petitioner had not previously manifested that he was mad at Dr. Jamison, that said statement attributed to petitioner had reference to something more recently said or done by Dr. Jamison, or that petitioner thought he had more recently said or done, in his *private* or *unofficial* capacity, rather than to said examination. It is, therefore, contended that said statement is not substantial evidence to show either that said assault was caused by, grew out of,

or had connection with said examination, or that said assault was made "knowingly", that is, with the intent to hinder or interfere with the administration of said Act or the rules or regulations thereunder.

5. The police officers, Claud Vance and F. C. Lamb, testified (R. 37, 53) to the effect that, shortly after the encounter or difficulty between petitioner and Dr. Jamison, in response to a remark by Claud Vance to the effect that he might have killed the man he assaulted, the petitioner in effect said that Dr. Jamison had been trying to put him in the Army "for the last two years" and also (R. 38, 53) that Dr. Jamison had been "meddling" in his business. The witness, W. E. Hopton, an agent of the Federal Bureau of Investigation, who talked to petitioner on the occasion he was arraigned before the United States Commissioner, in effect testified (R. 39) that, when he asked him why he had hit Dr. Jamison, petitioner told him that Dr. Jamison had been trying to put him into the Army; that, when he asked him if Dr. Jamison had ever said anything to him about putting him in the Army, petitioner said he had not, but that several people had told him Dr. Jamison "was trying" to get him in the Army; and that, when he asked him who had told him that, petitioner said that both Dr. Rawlins and Dr. Wiles had told him that.

It is to be noted that in these statements attributed to petitioner no reference is made to his examination by Dr. Jamison approximately two and one-half years previously nor to anything that Dr. Jamison told him on that occasion. The statement to the effect that Dr. Jamison had been trying to put him into the Army, attributed to petitioner by said police officers, was limited to the "last two years", and did not embrace but excluded by approximately six months the time of Dr. Jamison's examination of petitioner. The words "was trying" in the statement attributed to

petitioner by agent Hopton limited the efforts, if any, of Dr. Jamison to put petitioner in the Army to recent acts or statements of Dr. Jamison, and exclude the idea that petitioner by said statement was referring to said examination two and one-half years before. Further, when pressed by agent Hopton, petitioner did not refer to said examination or to anything said or done on that occasion but gave, as his reason for saying that Dr. Jamison was trying to put him in the Army, the fact that several people, including Dr. Rawlins and Dr. Wiles, had told him so. In view of these considerations, and the fact that it is undisputed that the only *official* act or exercise of duty by Dr. Jamison as examining physician was his aforesaid examination of petitioner, it is submitted that the conclusion is compelled that these statements attributed to petitioner referred to something said or done, or that, petitioner thought was being said or done, by Dr. Jamison in his *private* or *unofficial* capacity to get him in the Army and not to said examination, and that they are not substantial evidence to prove either that petitioner's assault upon Dr. Jamison was caused by, grew out of or had any connection with said examination, or that petitioner committed said assault "knowingly", that is, with the deliberate purpose or specific or actual intent to hinder or interfere with the aforesaid Act or the rules or regulations thereunder.

Even if the aforesaid statements attributed to petitioner by said police officers and Federal agent, made subsequent to his assault upon Dr. Jamison, be conceded for argument's sake to be some evidence that said assault was caused by, grew out of or had connection with Dr. Jamison's examination of petitioner, and that said assault was "knowingly" made, in the sense heretofore urged, it is submitted that there is no evidence, apart from and independent of said subsequent extrajudicial statements, proving or sub-

stantially tending to prove such essential elements or ingredients of the crime charged, or *corpus delicti.*

The *corpus delicti* cannot be established by such extrajudicial statements in the absence of such independent evidence. *Tingle* v. *United States* (C. C. A. 8), 38 F. (2d) 573; *Forte* v. *United States,* 68 App. D. C. 111, 94 F. (2d) 236, 127 A. L. R. 1120; *Gulotta* v. *United States* (C. C. A. 8), 113 F. (2d) 683; *Pines* v. *United States* (C. C. A. 8), 123 F. (2d) 825; *Warszower* v. *United States,* 312 U. S. 342, 61 S. Ct. 603, 85 L. ed. 876; *Wigmore, Evidence,* 3rd edition, Sections 2070-2071; 22 *C. J. S.,* pages 1471 *et seq.,* Section 839.

Thus, it appears and is again submitted, that there is no substantial evidence to prove two of the essential ingredients or elements of the offense charged, namely; that said assault by petitioner upon Dr. Jamison was caused by, grew out of, or was in any way connected with his examination of petitioner on December 23, 1940, and that said assault was committed "knowingly", that is, with the deliberate purpose or specific or actual intent to hinder or interfere with the administration of the Selective Training and Service Act or the rules or regulations thereunder.

With reference to the third essential element or ingredient of said offense, that said assault caused, as a matter of fact, an actual hindrance or interference with the administration of said Act or the rules or regulations thereunder, there is no evidence or proof whatsoever in the record of such actual hindrance or interference, as is demonstrated in the accompanying petition for writ of certiorari under the heading "SUMMARY STATEMENT OF THE MATTER INVOLVED", to which reference is here made in the interest of brevity.

If, as a matter of law, an assault upon a member of a Selective Service Board or one of its examining physicians,

growing out of his exercise of duty, is an interference with the administration of said Act or the rules and regulations thereunder, then no evidence of an actual hindrance or interference, as a matter of fact, is required to warrant or sustain a conviction of the offense defined or created in the clause, quoted *supra,* of Section 11 of said Act under which petitioner was indicted in this case.

If, on the other hand, an actual hindrance or interference, as a matter of fact, is a necessary or essential element or ingredient of said offense, as heretofore argued it is, then petitioner's conviction was unwarranted, cannot be sustained and must be reversed because there is no evidence of such hindrance or interference.

Wherefore, it is respectfully submitted that this case is one calling for the exercise of this Court of its supervisory powers, by granting a writ of certiorari as prayed for in the accompanying petition, and thereafter reviewing and finally reversing the judgment and decision in this case of the United States Circuit Court of Appeals for the Sixth Circuit.

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